IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENNETH W. BLAKE, Appellant, v. CITY OF BONNEY LAKE, a municipal corporation, Respondent.	No. 37958-9-II UNPUBLISHED OPINION

Hunt, J. — Kenneth W. Blake appeals the trial court's summary judgment dismissal of his conversion claim against the City of Bonney Lake for alleged wrongful impoundment of his vehicles. Blake argues that summary judgment was inappropriate because there remained questions of material fact about whether (1) the City complied with RCW 46.55.085's notice requirements before impounding his vehicles, (2) Blake's vehicles were on the City's right of way, and (3) the vehicles were "'unauthorized vehicles' within the meaning of RCW 46.55.085 and RCW 46.61.570(2)." Br. of Appellant at 1. The City responds that summary judgment dismissal of Blake's tort action was proper because RCW 46.55.120[1] provides the exclusive remedy for challenging vehicle impoundment. Based on the Supreme Court's recent *Potter*[2] decision, we disagree with the City, reverse, and remand.

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[1] The legislature amended RCW 46.55.120 in 2009. See ESH 1362 (effective July 26, 2009). This amendment does not affect any portion of the statute relevant to this appeal.

[2] *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008).

FACTS

I. Background

After the City of Bonney Lake completed a survey of Kenneth W. Blake's property, the City's code enforcement officer determined that Blake had illegally parked several vehicles on the City's right of way. On September 6, 2005, the code officer notified the police that the City wanted these vehicles removed and asked the police to "tag those vehicles that appear to be stationary in the [right of way]" and to remove them.[3] The City impounded three vehicles, one of which may not have been registered to Blake.

Less than 24 hours later that same day, September 6, Cascade Towing, Inc. impounded some of Blake's vehicles, towed them to an impound lot, and notified Blake. Blake neither redeemed the impounded vehicles nor challenged the impoundment under RCW 46.55.120. On October 20, 2005, Cascade sold some of the vehicles at auction.

II. Procedure

Blake sued the City, alleging the following claims: (1) "'state Constitutional tort,'" (2) slander of title, (3) inverse condemnation, (4) civil conspiracy, (5) conversion, (6) trespass, (7) malicious prosecution, and (8) abuse of process. The City moved for summary judgment. The trial court granted the City's motion for summary judgment in part, dismissing Blake's State Constitutional tort, slander of title, inverse condemnation, and civil conspiracy claims with prejudice. At this point, the trial court denied summary judgment dismissal of Blake's remaining

[3] The record does not show whether the City tagged Blake's vehicles or provided any notice to Blake to remove his vehicles or face impoundment.

claims.

The City moved for reconsideration. After considering the parties' briefs and numerous declarations and hearing oral argument, the trial court dismissed Blake's conversion claim with prejudice, noting, "Specifically, all claims for loss, costs, fees, or damages recoverable under the hearing provided in RCW 46.55.120 are dismissed, with prejudice." Clerk's Papers (CP) at 32.[4]

Blake appeals the trial court's April 25, 2008 summary judgment dismissal of his conversion claim.

analysis

Blake argues that the trial court erred in dismissing his conversion claim on summary judgment because there remained questions of material fact: (1) whether the City complied with RCW 46.55.085's notice requirements, (2) whether the vehicles were in fact on the City's right of way, and (3) whether his vehicles were "'unauthorized vehicles' within the meaning of RCW 46.55.085 and RCW 46.61.570(2)." Br. of Appellant at 1. We agree.

I. Standard of Review

When reviewing a summary judgment, we engage in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo. *Hisle*, 151 Wn.2d at 860. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[4] The remaining claims were tried to a jury, which returned a verdict in the City's favor. The trial court entered judgment for the City's favor in the amount of $418.20.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

We view all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No*. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co*., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). In addition, we can affirm the trial court on any ground supported by the record, even if the trial court did not consider this ground below. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)), *cert. denied*, 493 U.S. 814 (1989)

II. RCW 46.55.120 Not Exclusive Remedy

The City argues that the trial court properly dismissed Blake's conversion claim after it determined that RCW 46.55.120 was Blake's exclusive remedy for challenging impoundment of his vehicles.[5] RCW 46.55.120 provides that anyone seeking to redeem an impounded vehicle has a right to a hearing before the district or municipal court to determine the validity of the impoundment.[6] The Washington Supreme Court's recent decision in *Potter* defeats the City's

[5] The parties filed their briefs in the instant appeal before the Supreme Court issued its decision in *Potter*.

[6] RCW 46.55.120(2)(b) provides:

> Any person seeking to redeem an impounded vehicle under this section has a right to a hearing in the district or municipal court for the jurisdiction in which the vehicle was impounded to contest the validity of the impoundment or the amount of towing and storage charges. The district court has jurisdiction to determine the issues involving all impoundments including those authorized by the state or its agents. The municipal court has jurisdiction to determine the issues involving impoundments authorized by agents of the municipality. Any request for a hearing shall be made in writing on the form provided for that purpose and must be

argument.

In *Potter*, our Supreme Court addressed "whether the process for redeeming an impounded vehicle as set forth in RCW 46.55.120 is the exclusive remedy for a person whose vehicle is unlawfully impounded." 165 Wn.2d at 72. The Court held that "RCW 46.55.120 is not exclusive and, therefore, a person whose vehicle is unlawfully impounded may bring a conversion action against the authority that authorized the impoundment." *Id.* Accordingly, to the extent the trial court dismissed Blake's conversion claim based on the assumption that RCW 46.55.120 provided his exclusive remedy, it erred.

III. Remaining Questions of Fact

Blake argues that the trial court dismissed his conversion claim after determining that there were no questions of fact about whether the City had properly impounded his vehicles. Because we can affirm the trial court on any ground supported by the record,[7] we briefly examine this issue. We hold that there was clearly an issue of fact about whether the City provided the proper notice to Blake as required under RCW 46.55.085; thus, summary judgment was improper.

> received by the appropriate court within ten days of the date the opportunity was provided for in subsection (2)(a) of this section and more than five days before the date of the auction. At the time of the filing of the hearing request, the petitioner shall pay to the court clerk a filing fee in the same amount required for the filing of a suit in district court. If the hearing request is not received by the court within the ten-day period, the right to a hearing is waived and the registered owner is liable for any towing, storage, or other impoundment charges permitted under this chapter. Upon receipt of a timely hearing request, the court shall proceed to hear and determine the validity of the impoundment.

[7] *LaMon*, 112 Wn.2d at 200-01.

The City impounded Blake's vehicles as unauthorized vehicles left within a highway right of way. RCW 46.55.085 provides:

> (1) A law enforcement officer discovering an unauthorized vehicle left within a highway right-of-way shall attach to the vehicle a readily visible notification sticker. The sticker shall contain the following information:
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> (a) The date and time the sticker was attached;
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> (b) The identity of the officer;
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> (c) *A statement that if the vehicle is not removed within twenty-four hours from the time the sticker is attached, the vehicle may be taken into custody and stored at the owner's expense*;
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> (d) A statement that if the vehicle is not redeemed as provided in RCW 46.55.120, the registered owner will have committed the traffic infraction of littering—abandoned vehicle; and
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> (e) The address and telephone number where additional information may be obtained.
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> (2) If the vehicle has current Washington registration plates, the officer shall check the records to learn the identity of the last owner of record. The officer or his department shall make a reasonable effort to contact the owner by telephone in order to give the owner the information on the notification sticker.
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> (3) *If the vehicle is not removed within twenty-four hours from the time the notification sticker is attached*, *the law enforcement officer may take custody of the vehicle and provide for the vehicle's removal to a place of safety*. A vehicle that does not pose a safety hazard may remain on the roadside for more than twenty-four hours if the owner or operator is unable to remove it from the place where it is located and so notifies law enforcement officials and requests assistance.
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> (4) For the purposes of this section a place of safety includes the business location of a registered tow truck operator.

(Emphasis added).

RCW 46.55.085 unequivocally states that an officer must post a notice on the vehicle and that the vehicle will be removed only if it is not moved within 24-hours. But the materials the trial court considered at summary judgment established that (1) on September 6, 2005, the City requested that the police remove these vehicles; and (2) the City impounded and Cascade removed the vehicles *that same day*. Thus, there is, at least, a question of fact as to whether the

City properly impounded the vehicles without first giving Blake proper notice.

Because RCW 46.55.120 was not Blake's exclusive remedy and questions of fact exist as to whether the City's impoundment of his vehicles was lawful, we reverse the trial court's summary judgment dismissal of Blake's conversion claim and remand for further proceedings on the conversion claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Armstrong, J.